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No. 75-228

In the Supreme Court of the United States

OCTOBER TERM, 1975

WELLMAN INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 40a-41a) is unreported. The Board's decision and order (Pet. App. 1a-39a) are reported at 211 NLRB No. 96. The underlying Decisions, Directions of Election and Certification of Representatives (Pet. App. 42a-74a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1975, and a timely petition for rehearing *en banc* was denied on May 22, 1975. The petition for a

writ of certiorari was filed on August 12, 1975. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly held that an employer's objections to two representation elections presented no material issues of fact requiring a hearing.

STATUTE INVOLVED

Section 9(c) of the National Labor Relations Act, 61 Stat. 143, as amended, 29 U.S.C. 159(c) is reproduced in the petition (Pet. 2–4). Section 8(a) of the Act, 61 Stat. 140, as amended, 29 U.S.C. 158(a) provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

On November 17 and 18, 1971, the National Labor Relation Board's Regional Director conducted a representation election among production and maintenance employees of petitioner, Wellman Industries, Inc. (the "Company"). The Textile Workers of America, AFL–CIO (the "Union") lost by a vote of 499–488 (Pet. App. 47a–48a). Thereafter, the Union

filed objections to the election complaining, *inter alia*, of alleged misrepresentation in a Company handbill, entitled "WAS THE UNION AFRAID TO SHOW THIS CONTRACT", distributed to the employees just before the polls opened for balloting, which quoted wage rates from a contract between the Union and another employer in Hendersonvile, North Carolina (Pet. App. 50a–51a, 54a–56a).

Pursuant to the Board's Rules and Regulations, Series 8 (29 C.F.R. 102.69(c)), the Board's Regional Director conducted an administrative investigation, affording the parties full opportunity to submit pertinent evidence. The investigation revealed that the contract from which the Company took the quoted minimum prevailing rates had in fact been cancelled and superseded more than a year earlier, on October 5, 1970, by a new contract, currently in effect, which scheduled increases of 13 cents in both October 1971 and October 1972 for all job classifications mentioned by the Company in its handbill. Therefore, the handbill's statement that *"there are no wage increases in the years 1970 and 1972"* (emphasis in handbill) "was not factual" (Pet. App. 51a). The Regional Director concluded that these misrepresenatations were matters of vital concern to the voters, that the voters were not in a position to know the true facts, and that the misrepresenatations could reasonably be expected to have a substantial effect on the election. The Director also held that, assuming the truth of the Company's assertion that the handbill was distributed as early as November 15, 1971, and given the nature of the misstatements, the

Union did not have an effective opportunity to reply before balloting began on November 17 (Pet. App. 50a–52a). Consequently, the Regional Director set aside the election results and ordered that a second election be conducted (Pet. App. 53a–54a).[1] The Company's request for review was denied by the Board (Pet. App. 13a–14a).

On April 19 and 20, 1972, a second representation election was conducted. A majority of the employees (557–466) voted for the Union (Pet. App. 64a–65a). The Company filed timely objections, alleging, *inter alia,* that certain messages circulated by the Union to the employees constituted false and improper election propaganda (Pet. App. 65a–66a).

The Company asserted that a Union handbill suggested that a personal transaction of its president was financed by corporate funds accumulated by denying the employees retroactive wage increases which they had lost when an announced wage increase was delayed because of the wage-price freeze of 1971 (Pet.

[1] In February 1972 the Company requested the Regional Director and the Board to furnish it with all affidavits and statements upon which the Regional Director relied in making his findings in the first election. In accordance with established Board procedure all such requests were denied. On January 25, 1973, the Company instituted an action pursuant to the Freedom of Information Act, 5 U.S.C. 552, alleging that it was entitled to all affidavits obtained pursuant to investigation of the first election. The district court dismissed the complaint (*Wellman Industries, Inc.* v. *National Labor Relations Board*, 82 LRRM 2857 (D. S.C.)), the court of appeals affirmed (490 F.2d 427), and this Court denied certiorari (419 U.S. 834).

App. 67a);[2] and that a recorded telephone message had the same effect (Pet. App. 69a).

The Company also proffered a leaflet which had been distributed by the Union on April 18 and 19 entitled "Wellman 'Double-Crossed' Us On Our Pay Raise!" (Pet. App. 76a–77a). The Company asserted that this leaflet contained misrepresentations as to the reasons for the Company's withholding of a promised

[2] The handbill read (Pet. App. 75a):

"SPECIAL UNION MEETING

"D Shift meeting at 4:15 P.M. today (Tuesday) immediately after work, at the Johnsonville T.W.U.A. Union Hall.

"IS THIS WHERE YOUR BACK PAY WENT???
$$$$$$$$$$
"Big Jack (G.) for $Goldmine$ Wellman just
$$$$$$$$$$

bought a *Two* hundred Eighty-Five Thousand dollar ($285,000) House and Plantation on January 11, 1972 of this year.

"Come out to your union meeting and see actual photo copies of two land deeds from the Official Williamsburg County Court House Records. These records show official proof that the President of Wellman Industries purchased a $285,000 Plantation of [sic] January 11 of this year.

"Lately, the Wellman Company has been trying to 'poor mouth', us workers. You be the judge! It seems to us if the President of Wellman Industries can buy himself a $285,000.00 Plantation and House, he could certainly have afforded to pay us our thirteen (13) weeks back pay from August 15 through November 15, 1971.

"VOTE YES—FOR HIGHER WAGES AND BETTER WORKING CONDITIONS!

"ISSUED BY: IN-PLANT ORGANIZING COMMITTEE-T.W.U.A. AFL–CIO.

"If you have to stay a little after 4:00 P.M., come by the Union Office regardless of what time you get off!"

wage increase during the nationwide wage-price freeze of August 15, 1971, and that it falsely implied that the Company had promised and thereafter reneged on a promise to grant "back wages" to August 16, 1971, the date when a general wage increase was originally scheduled to go into effect (Pet. App. 72a).[3]

The Regional Director considered the Company's contentions and arguments, but concluded that the leaflets and the telephone message were "permissible election propaganda which the employees could evaluate for themselves" (Pet. App. 69a, 74a). Accordingly, on June 14, 1972, the Regional Director issued a Second Supplemental Decision and Certification of Representatives in which he overruled the Company's objections and recommended that the Union be certified as the exclusive bargaining representative of the unit's employees (Pet. App. 64a–74a). The Board

[3] The Company argued that it had notified its employees that a general wage increase would take effect on August 16, 1971, but, as a result of a wage-price freeze and the Office of Emergency Preparedness' subsequent denial of its request for an exemption on October 6, 1971, it had to postpone the increase until November 14, 1971, when it received authorization from the government and granted an increase from that date. The Company was not authorized on November 14, 1971, to grant any retroactive payment of wages, however, and it had not notified its employees of any intention to do so. Not until January 27, 1972, did the Company receive authorization to pay its employees retroactive pay for the period between August 16, 1971, and November 14, 1971. However, it opted not to grant the payment of "back wages" for this period. The Company contended that accusations in the leaflet of "double-cross" were false because the Company informed the employees of its actions to grant the increase and did so as soon as possible, but had never promised to grant them any "back wages" (Pet. App. 72a–73a).

denied the Company's request for review of the Second Supplemental Decision (Pet. App. 14a–15a).

Thereafter, the Company refused to bargain and the Board issued an unfair labor practice complaint. After unfair labor practice proceedings,[4] the Board held that the Company had violated Section 8(a)(1) and (5) of the Act and ordered it, *inter alia,* to bargain with the Union upon request (Pet. App. 3a–7a).

The court of appeals in a *per curiam* enforcement of the Board's order held that petitioner had illegally refused to bargain, and further stated that (Pet. App. 41a):

> the board properly set aside the results of the first election and overruled the company's objections to the second election without a hearing because there were not substantial and material factual issues with respect to either.

ARGUMENT

Petitioner admits its refusal to bargain, but contends that the Union's objections to the first election and the Company's objections to the second election presented material issues of fact which the Board should not have decided without an evidentiary hearing.[5] In effect, the Board accepted the Company's

[4] An evidentiary hearing was held on the Company's claim of newly discovered evidence relating to an election objection which the Company is no longer contesting (Pet. App. 4a, 26a–38a). No issue pertaining to that aspect of the case is raised here.

[5] There is no dispute concerning petitioner's assertion (Pet. 8–9) that the law requires that where "substantial and material" factual issues are raised in objections, an evidentiary hearing must be held. *E.g., National Labor Relations Board* v. *Bata Shoe Co.*, 377 F. 2d 821, 825–826 (C.A. 4), certiorari denied, 389 U.S. 917. The Board's rules so provide (Series 8, 29 C.F.R. 102.69(c)).

allegations concerning the matters on the handbills as true, and simply determined whether those matters were legally sufficient to justify setting aside the election.

In the first election the Company did not show that a hearing was necessary for the Board to conclude that the wage rates set forth in its handbill entitled "WAS THE UNION AFRAID TO SHOW THIS CONTRACT" were inaccurate. The only evidentiary conflict concerning this handbill was the precise date of its distribution. The Director assumed distribution on November 15, 1971, the earliest date suggested by the Company. In view of the Company's undeniable misrepresentations making invidious comparisons between wage rates in another unionized firm and the Company, he properly concluded that the Union did not have sufficient opportunity to respond before the polls opened on November 17 (*supra*, pp. 3–4).

The Company's objections to the second election were based upon a recorded Union telephone message and two union handbills, "Special Union Meeting" (*supra* n. 2, p. 5), and "Wellman 'Double-Crossed' Us on Our Pay Raise!" (discussed *supra* n. 3, p. 6). The first handbill, and the telephone message, simply identified the firm's president with the Company and suggested, argumentatively, that, if he could afford to buy an expensive home, his Company could afford to pay back wages lost as a result of the federal wage freeze (Pet. App. 75a). The second handbill stated only that there was a discrepancy between the Company president's asserted outrage at the wage freeze, and the Company's failure to pay a retroactive wage

increase which the government, some 2½ months before the election, had authorized the Company to pay if it wished (Pet. App. 76a–77a). The message and the handbills were thus factually true on their face, but contained in addition the kind of propaganda typical of organizing campaigns. Comparison of the Company's objections (Pet. App. 65a) with the contents of the message and the handbills (Pet. App. 69a, 75a, 76a) plainly shows that the Regional Director had ample grounds for concluding that the Company was objecting to the arguments, not to the facts set forth. Responsibility for weighing the Union's arguments against the Company's in light of the known facts concerning what had been said and done about the wage freeze belonged to the employee-electorate alone. Petitioner thus proffered no issue of material fact which would have warranted a hearing. Cf. *National Labor Relations Board* v. *Tennessee Packers, Inc., Frosty Morn Div.*, 379 F. 2d 172, 178 (C.A. 6), certiorari denied, 389 U.S. 958.[6]

[6] The cases relied on by petitioner are not to the contrary. In those cases, the companies' objections, unlike those here, put in issue factual statements which the company alleged to be false. Thus, in *Henderson Trumbull Supply Corp.* v. *National Labor Relations Board*, 501 F. 2d 1224, 1225 (C.A. 2) (Pet. 10, 12, 13, 14), the company contended that the union mistated the amount of its profits and falsely asserted that its president had bought a new house. In *Argus Optics* v. *National Labor Relations Board*, 89 LRRM 2280 (C.A. 6) (Pet. 10,13, 14), the company contended that union propaganda had falsely attributed parent corporation profits to the company, and it was a disputed factual issue whether a subsequent union clarification remedied the former assertion. And in *National Labor Relations Board* v. *Janler Plastic Mold*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Corp., 82 LRRM 2174 (C.A. 7) (Pet. 10, 11, 13), there were unresolved factual disputes as to whether a union agent had threatened job losses, and whether union contentions as to specific benefits which follow from unionization constituted material misrepresentations.

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